

IN THE MATTER OF	:	BEFORE THE
	:	HOWARD COUNTY
<b>LUBAVITCH OF HOWARD</b>	:	<b>BOARD OF APPEALS</b>
<b>COUNTY, INC.</b>	:	
Petitioners	:	HEARING EXAMINER
	:	BA Case No. 07-029C

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**DECISION AND ORDER**

On January 12, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Lubavitch of Howard County, Inc. ("the Petitioner"), for conditional use approval to: (1) expand and renovate a previously approved conditional use for a structure used primarily for religious activities (the "multi-purpose building") and expand the building's parking area, pursuant to Section 131.N.39 of the Howard County Zoning Regulations, and (2) construct four age-restricted, adult multi-plex dwellings, pursuant to Section 131.N.1.b. of the Howard County Zoning Regulations (the "Zoning Regulations"), in an R-20 (Residential: Single) Zoning District.

The Petitioners certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Richard Talkin, Esquire, represented the Petitioner. Zach Fisch and Hillel Baron testified on behalf of the Petitioner. Susan Bard testified in support of the petition. Kathy Barnet testified as a representative of the Sebring Civic Association in opposition to the petition. Joan Lancos testified as a spokesperson for several persons in the community in opposition to the petition.

Greg Schwind, chair of the Hickory Ridge Community Association, testified in opposition to the Petition. Jane Schuchardt, an adjoining property owner, testified in opposition to the petition.

### **FINDINGS OF FACT**

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The subject property is located in the northeast corner of the intersection of Howes Lane with Rodona Drive in the 5<sup>th</sup> Election District. The Property is referenced on Tax Map 36, Grid 7, as Parcel 88 and is known as 770 Howes Lane (the "Property").

2. The Property is an irregularly shaped, 4.791-acre parcel<sup>1</sup> improved with a one-story main building situated in the eastern section about 250 feet from Rodona Drive. This main building, a former single-family detached dwelling, is jointly used as a private school, day care, and religious facility.<sup>2</sup> These uses are accessed via a private circular driveway off Howes Lane. To the driveway's west are two accessory buildings, which will be removed. Parking is provided to the south of the main building.

3. The Property's elevation drops considerably toward US 29 (the east) and toward Rodona Drive (to the west and northwest). The western section is mostly lawn, with mature evergreen trees planted in two lines to screen the view of the uses from Rodona Drive and Howes Lane.

4. **Zoning History:**

A.	Case No.:	BA 01-015N
	Petitioner:	Lubavitch of Howard County

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<sup>1</sup> This acreage is derived from the conditional use plans submitted in evidence during the proceeding.

<sup>2</sup> In BA Case No. 01-15N/01-15E (submitted as Opponents' Exhibit 2), the Board of Appeals determined the original and first addition had been jointly used by the private school and temple and "sees no reason why this arrangement cannot be continue in the planned addition under the facts presented in this case."

Request: Confirmation and enlargement of a nonconforming private school  
(Section 129.D. and Section 129.E.)  
Action: Approved November 6, 2003

B. Case No.: BA 95-36E  
Petitioner: Lubavitch of Howard County  
Request: Special Exception for a private school  
Action: Granted January 30, 1996 subject to the following conditions:

1. The special exception shall apply only to the proposed elementary school for 60 students from grades 1 through 6, a 25' by 80' addition to the existing principal structure, relocation of the driveway to the end of Howes Lane and installation of parking, all as described in the petition and plan submitted to the Board, and as revised with the following conditions, and not to any other activities, uses, structures, additions, or fields on the subject property.
2. The Petitioner shall remove the existing driveway to Rodona Drive. The area shall then be graded and grass shall be planted so as to return the topography to its original condition.
3. The Petitioner shall install a Type C landscape buffer along the northern and southern property lines and to the west of the area between the north edge of the play area and the south of the apartment structure. Previously required landscaping shall likewise be maintained and shall be removed only if necessary to construct the proposed improvements. Any trees which are required by the previously approved special exceptions which are not in place shall be replaced with trees of a minimum of six feet in height. All existing trees along the northern property line shall be retained. All landscaping shall comply with the Howard County Landscaping Manual.
4. Driveways and parking areas shall be paved and stormwater management facilities shall be provided unless a waiver is approved by the Department of Planning and Zoning. The parking area shown as existing on the special exception plan shall be paved or otherwise surfaced with the same material as the new parking area. Dimensions of all parking spaces and drive aisles shall comply with Howard County Design Manual standards.
5. Private trash collection using a dumpster shall be provided and screened from vicinal properties.
6. Public water and sewer facilities shall be provided as required by Howard County Health Department.
7. The debris from the demolition of the shed near the intersection of Howes Lane and Rodona Drive shall be removed.
8. A circular drive in conformance with the Petitioner's amended special exception plan must be constructed in order to enable safe traffic flow.
9. The bus shall be stored so as not to be visible from Rodona Drive.

10. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.
11. The special exception shall not commence until the foregoing conditions have been met and the Department of Planning and Zoning has conducted an inspection of the property to verify compliance. A copy of the inspection report shall be filed with the Board of Appeals.
12. The special exception granted herein shall expire two years from the date of this Decision and Order, unless renewed by the Petitioner in accordance with Section 131.H.2. of the Zoning Regulations.

On July 2, 1996, in response to a Motion to Clarify and/or Modify Decision and Order filed by the Petitioner, the Board of Appeals issued a new Order for BA 95-36E as follows:

1. That the Board's Decision and Order in BA Case 95-36E, dated January 30, 1996, is hereby amended as follows:
  - (a) Provided that all other conditions of the Decision and Order are met, the Petitioner may permit children attending the elementary school to use the outdoor recreation areas currently used by the children of the day care program.
  - (b) Provided that all other conditions of the Decision and Order are met, once the 25' by 80' addition is constructed, the Petitioner may permit children in the elementary school to use portions of the addition, provided that the number of children in each program complies with the requirements of the respective special exception.
2. That the Petitioner's request to clarify and/or modify the Decision and Order to permit the Petitioner to use the existing structure to conduct elementary school activities until the 25' by 80' addition is constructed is hereby DENIED; and
3. The Decision and Order, except as modified herein, remains in full force and effect.

On February 24, 1998, the Board of Appeals renewed BA 95-36E to be extended until January 30, 2000 unless renewed by the Petitioner. This Order included a finding that "...the Petitioner has substantially complied with the conditions of approval set forth in the Decision, as amended..."

On February 10, 2000, the Board of Appeals renewed Board of Appeals 95-36E a second time, and ordered that "further renewal of the special exception use shall not be required."

- C. Case No.: WP 93-21  
Petitioner: Lubavitch of Howard County  
Request: Waiver to Section 16.143(3) of the Subdivision and Land Development Regulations which requires the approval of a Site Development Plan for a special exception use.

Action: Approved, September 18, 1992, subject to two conditions:

1. Compliance with the installation of the proposed landscape screening as shown on the waiver petition landscape plan indicating 38 pine trees six foot in height to be planted within 45 days from the date of this letter.
2. The Department of Planning and Zoning will make an inspection of the premises on or after November 16, 1992 to verify compliance with the landscape plan as required by BA 88-37C.

D. Case No.: BA 88-37E  
Petitioner: Lubavitch of Howard County  
Request: Special Exception for a religious facility and day care center.  
Action: Granted January 24, 1989 subject to the following conditions:

1. That the proposed uses be limited to 1,500 square feet of assembly area for the religious services and a limit of 30 children for the proposed day care. No expansion of these facilities shall be permitted without an amendment to this special exception.
2. Petitioner shall submit a detailed landscape plan for screening and buffering along the west, north, and south property lines.
3. Petitioner shall not conduct outdoor services, nor use sound amplification equipment or devices out-of-doors.
4. Petitioner shall limit the number of parking spaces to minimum required by law.
5. Petitioner shall relocate the proposed parking lot to the east side of the special exception structure. Consequently, the proposed driveway shall be extended from its proposed terminus to reach the relocated parking lot. Petitioner shall modify the special exception plan accordingly and submit it to the Board within 60 days.
6. That Petitioner shall comply with all applicable County, State and Federal laws and regulations.

In response to a request for Clarification of Conditions 1 and 2 of the Decision and Order for BA 88-37E, this special exception was modified January 3, 1995 and was then revised on January 17, 1995 as follows:

1. That the proposed uses be limited to 1,500 square feet of assembly area for the religious services and a limit of 30 children for the proposed day care. The proposed day care operation shall be limited to children between the ages of three (3) to five (5), and shall not contain elementary school grades. No expansion of these facilities shall be permitted without an amendment to the special exception.
2. Request for clarification of condition #2 was withdrawn by the Petitioner.

5. **Vicinal Properties.** To the north, Lots 1 and 2 of Parcel 53, a 2.06 acre parcel located in an R-20 Zoning District, are each improved with a single-family dwelling. These lots are accessed from the Rodona Drive cul-de-sac. To the east is the eastbound Broken Land Parkway ramp to southbound US 29. The nearest dwellings to the southeast across US 29 are located on Amherst Drive, approximately 600 feet from the Property.

To the west, across Rodona Drive, are six single-family dwellings on lots located in the Village of Hickory Ridge, Section 2, Area 1, and zoned NT (New Town). These dwellings front on Covington Road, with their partially wooded rear yards facing Rodona Drive. Lots 1 of the R-20 zoned Parcel 99. Lot 1 is improved with a single-family dwelling. Lots 1 of the 2.3-acre R-20 zoned Parcel 100 to the Property's south side is also improved with a single-family detached dwelling.

6. **Roads.** Howes Lane has 30 feet of paving within an existing 50-foot wide right-of-way. Rodona Drive is a cul-de-sac with 24 feet of paving within an existing 80-foot wide right-of-way.

Visibility from the Howes Lane driveway entrance appears to be acceptable, with estimated sight distance of approximately 400 feet to the west from the end of Howes Lane. Precise sight distance measurements may only be determined through a detailed sight distance analysis, however. There is no traffic volume data available for Howes Lane or Rodona Drive.

7. **Water and Sewer Service.** The Property is served by public water and sewer facilities.

8. **General Plan.** The Property is designated "Residential Areas" on the Policies Map 2000-2020 of the 2000 General Plan, which depicts Howes Lane and Rodona Drive as local roads.

9. The Proposal

A. Expansion of the Existing Religious Facility. The Petitioner is proposing to expand the existing religious facility through the construction of a one-story, 75' by 103' (7,725 square feet) multi-purpose building attached to the west side of the existing main building. According to the Technical Staff Report ("TSR"), the multi-purpose building will comprise a 1,540 chapel space for daily worshipers. About 3,192 square feet will be used as an assembly area on Fridays, Saturdays, and holidays, which brings the total religious assembly area to 3,500 square feet. Based on this square footage, 35 parking spaces are required for the assembly area. Including these spaces, 56 parking spaces are provided for the religious facility and school. The TSR further notes the remaining space will be used for an administrative office, two kosher kitchens, bathrooms, hallways, maintenance areas and storage. According to the Amended Conditional Use Plan dated January 12, 2009 (Petitioner's Exhibit 4), the multi-purpose building will be 14 feet in height. A small fenced play area is proposed to the northeast side the main building and a larger fenced playground is proposed further east. These play areas would replace those lost through construction.

Hillel Baron, the spiritual leader of the congregation, testified that the day care and religious assembly uses would be moved from the older buildings to the multi-purpose building. The building is intended to create a more pleasant environment and would be more efficient and easier to maintain. Children would be able to play in the multi-purpose center in hot or inclement weather. In response to questioning, he stated that there are about now about 40 ongoing families. On Friday nights five to ten persons attend, and on Saturdays, about 30-50. The attendance increases to about 140 persons on high holy days. The multi-purpose space would

also be used for post-religious ceremonies within the congregation, such as wedding celebrations. He testified the space would not be rented out as a "rental hall."

**B. Age-Restricted Multi-Plex Housing.** The Petitioner is also proposing to construct 16 age-restricted multi-plex condominium units in four, four-unit, two-story buildings (the "standard" buildings). Each building would be clad in brick and siding with a single, centered, covered entrance and symmetrical fenestration. Building 1 would be situated about 72 feet at its closest point from Rodona Drive and front the north side of the multi-purpose building. Buildings 2, 3, and 4 would generally be parallel to and about 40 feet from the west property line and 20 feet apart. These buildings would front the multi-purpose building and their rear facades would face Rodona Drive.

The footprint of each standard building is about 40' by 68'. Each unit would have two bedrooms, two baths, a living room, and a den. There will be porches on both floors of the building fronts, and first floor patios on the sides of each building. The November 11, 2008 Conditional Use Plan informing the TSR indicates that the first floor gross and net square footage is 2,937 and 2,522, respectively, and the second floor gross and net square footage, 2,825 and 2,477, respectively. The net floor area is therefore 4,999 square feet for each building. The building height is shown as 28 feet. According to Petitioner's Exhibits 6, and 7, the front elevations for the two-story buildings would be full stone masonry, and the side and rears, siding and/or masonry. According to the Conditional Use Plan dated January 12, 2009, 16 spaces are required and 35 are provided.

A sidewalk would connect Buildings 2, 3, and 4. A sidewalk in front of Building 1 would continue to the north side of the adjacent parking lot. Four "bench areas" are shown on the



Conditional Use Plan dated November 11, 2008, to the west and south of Building 1. A third "bench area" is shown in front of Building 3, and a fourth between the driveway between Building 4 and the parking spaces adjoining the west side of the curved driveway. A barbeque area is proposed between the multi-purpose building and multi-plex Building 1.

Mr. Fisch testified that the Petitioner amended the Conditional Use Plan in response to the TSR's conclusion that the Multi-Plex site design meets the technical requirements for approval, but lacks enhanced site amenities (which is also a requirement, as discussed below in Part III) and a cohesive spatial relationship. Petitioner's Exhibit 4, the Amended Conditional Use Plan dated January 12, 2009 thus depicts two additional amenity areas. The first is a bocci court/barbeque space between Building 1 and the proposed multi-purpose building. The second area would be situated just south of the multi-purpose building, between the multi-plex driveway in front of Buildings 3 and 4 and the parking spaces on the west edge of the circular driveway. This area would include a proposed gazebo.

The Amended Conditional Use Plan also depicts landscaping around the bench area in front of Building 3, around the amenity area just south of the multi-purpose building, along the west and north sides of the multi-purpose building, and lastly, around the east, south, and west sides of the stormwater management facility. In response to questioning, Mr. Fisch stated that additional landscape buffering could be provided around the facility.

Petitioner's counsel proffered the Petitioner's interest in an alternative multi-plex building design, a one-story structure that would meet all setbacks and square footage requirements (the "alternate" building). This building would replace Building 1. According to Petitioner's Exhibit 8, this alternate building is actually two stories, with a 60' by 60' footprint. On the first story

would be an owner's suite, a great room, a 9' by 14' bathroom, a utility area, a front outdoor terrace (about 24' by 10') for the front units, and small outdoor terraces for the rear units, which are also depicted as having optional rear decks. On the second story would be a 15' by 11' studio and a storage space larger than the 15' by 15' size depicted on the second floor plan. Unlike the standard units, which would be accessed from a central entryway, the "one-story" alternate building would have four separate entrances, a front entrance for the two front units facing the multi-purpose buildings, and individual side entrances for the rear units. The rear units would have side terraces and optional rear decks.

The petition includes a copy of the universal design features deemed appropriate by Howard County for age-restricted housing. It also includes a copy of the covenants establishing how the age restrictions required under the definition of age-restricted adult housing will be implemented and maintained.

10. **Vehicular Access and Parking.** The existing driveway at the terminus of Howes Lane in the southern portion of the Site would provide vehicular access for all uses. This existing driveway would be expanded to include five new parking spaces to be located in the center of the existing circular drive. One additional space would be located on the southeast side of the circular drive and eight additional spaces would be located on the westerly side of the circular drive. A new parking section containing 23 spaces would be added to the southwest side of the existing driveway and parking area. A total of 81 parking spaces is provided, according to the TSR, which notes that as condition of approval in BA 88-37E, the number of parking spaces on the site is limited to the minimum required. A new 24-foot wide drive aisle located

approximately 78 feet from the west property line would be created to provide access to the new parking areas.

Thirty-five parking areas are designated for the multi-plex buildings; these would be located to the east of Buildings 2, 3, and 4 and to the southwest of Building 1. This parking area will extend north from the existing Howes Lane driveway entrance and terminate in a "T" approximately 80 feet from the west property line. Including the existing parking spaces in the southern portion of the site, there are 81 spaces, including two disabled spaces.

11. A proposed dumpster and pad for the religious facility would be located adjacent to the one new parking space on the southeast side of the circular drive.

12. Two existing structures would be removed in conjunction with the proposal, a block building in the southwestern portion of the site and a wood building approximately 25 feet to the east of this block building. The dumpster situated on the east side of the wood building will also be removed.

13. Zach Fisch testified that the Department of Fire and Rescue's conclusion that the proposed additions would severely restrict emergency access to the school was based on an earlier plan depicting an entrance driveway off Rodona Drive. This driveway is removed in the November 11, 2008 Conditional Use Plan informing the TSR. He explained that Petitioner's Exhibit 1, an email between him and Timothy Diehl, Office of the Fire Marshall, dated January 12, 2009, confirms the Fire Department's conclusion that the new proposal was acceptable for Fire Department access.

14. Mr. Fisch also stated that the Petitioner would install a stop sign where the driveway meets Howes Lane.

15. Petitioner's Exhibit 9 is an April 13, 2007 letter to Zach Fisch from James D. Hade, Maryland State Highway Administration providing the noise level information collected near the Lubavitch Center. Mr. Fisch stated that the proposed land use would not be affected by its adjacency to US 29 and that the issue would be revisited at the site development phase.

16. Hillel Baron further testified that several damaged trees in the forest conservation and open space areas in the north had to be removed, and that all the dead and damaged trees had yet to be replaced. This area is depicted in the photographs included in Opponents' Exhibit 5.

17. In response to questioning, Hillel Baron testified that while there was no phasing plan, it was possible that two multi-plex buildings might be constructed first, together with the multi-purpose building shell. In relation to this testimony, I stated that I am now observing an increase in the number of requests to extend the time to establish conditional uses because of the extraordinary current economic climate and that I am extending the time to establish such uses by as much as three years.

18. When questioned about exterior lighting, he stated that it would not be the typical "spotlights," but shielded.

19. In response to questioning from Opponents, he testified that about fifteen children attend preschool and there is no current elementary school, but in other years, there are a kindergarten and first grade.

20. Susan Bard testified that as a senior she looked forward to the possibility of moving on the grounds.

21. Joan Lancos testified to being a spokesperson for two adjoining property owners on Rodona Drive, one on Howes Lane, and nine on Covington Road. It was her testimony that these

property owners do not want the multi-purpose building to be rented for some use other than that related to the religious facility and assembly and that the combination of uses is too intense for the site. She also stated the uses would have an adverse effect on narrow local roads with no shoulders and sidewalks. In addition, the property owners are concerned about stormwater management in relation to the increase in impervious surface.

22. Kathy Barnet testified that the proposed uses would increase traffic on three local streets, referring to Opponents' Exhibit 3, which depicts Covington Road and Rodona Drive and the Sebring Drive intersection with Covington Road.

23. Greg Schwind testified as chair of the Hickory Ridge Village Association that the bulk of the multi-plex buildings are inappropriate for an area of single-family homes.

24. Jane Schuchardt testified that landscaping required as a condition of approval in the 1989 special exception has never been properly maintained and that the stormwater management pond in the Property's northwest corner will not accommodate the additional uses.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, I conclude as follows:

#### **I. General Criteria for Conditional Uses (Section 131.B)**

**A. Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

**a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**

**b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

**General Plan Policies**

The Howard County General Plan designates the area in which the Property is located as a "Residential Area" land use. Religious facilities and multi-plex housing are presumptively compatible and appropriate in an R-20 district. The multi-plex use is harmonious with General Plan Chapter 4, Balanced and Phased Growth, especially the recommendations for Housing for Seniors and the Disabled. The religious facility is a long-standing use.

**Intensity of Use**

Pursuant to Section 131.B.1, my evaluation of the "intensity" of the proposed use or combination of use is a three-part test. The first test evaluates "intensity" in terms of the location of the site with respect to access streets. In the second test, "intensity" is evaluated in terms of the size of the site in relation to the use. In the third test, the "intensity" of the proposed conditional use in combination with other conditional or permitted uses is evaluated in terms of the adequacy of the proposed buffers and setbacks. Absent specific recommendations or policies in the General Plan that the use would be inharmonious, if the proposed use or uses pass muster under these three tests, I must conclude the nature and intensity of the proposed use is harmonious with the Plan.

There are currently two conditional uses and a nonconforming use on the site. The two conditional uses are a religious facility and a day care center. The Board of Appeals approved the existing private school as a nonconforming use. The Petitioner in this case is proposing to

expand the religious facility and construct a third conditional use, age-restricted multi-plex housing.

**a. The location of the site with respect to streets giving access to the site**

Based on the evidence and testimony of record, I conclude the location of the streets giving access to the site is adequate to support the nature and intensity of the proposed uses. Although the local access streets lack paving, there is no credible evidence suggesting these streets provide inadequate access to the site. The site is located on a cul-de-sac, which minimizes traffic in the immediate area. Importantly, the religious facility use has existed at this site for almost 20 years without access issues. As discussed below, while overall traffic levels will increase, the congregants, daycare users, school attendees, and the future residents of the multi-plex complex using these local streets will generally not do so at the same time. Additionally, the Board of Appeals in BA Case No. 95-36E in part approved the private school conditional use on the site on the condition that the access drive then off Rodona Drive be moved to the end of Howes Lane.

The Opponents' opposition to the petition is based in part on the site's location on a local road system. However, they did not point to any policy or recommendation in the General Plan to support their conclusion that this circumstance renders the conditional use plan inharmonious with the General Plan. Moreover, their testimony and evidence about actual or potential traffic problems caused by the site's location on a local road system suggest that the causes of any such problems are school buses, which make a three-point turn on one of these streets, and area residents parking on the shoulders of these very streets while awaiting the school bus (Opponents' Exhibit 3).

**b. The size of the site in relation to the uses**

As discussed in some detail in the TSR, and as I further explained at the hearing, I am first required to assess the nature and intensity of each proposed conditional use based on the entire site area, not the net area occupied by each use. In the words of the TSR, "[t]he Conditional Use criteria of the Zoning Regulations provides for the evaluation of each use as if it was the sole Conditional Use on the Property."

The religious facility uses, including the proposed uses in this petition, would include a 1,540-square foot section of the proposed multi-purpose building dedicated as the religious facility to be used by about 10 worshipers on a daily basis, a 3,192 square-foot assembly area within the multi-purpose building, and 35 parking spaces. Although the expansion of the religious facility would result in a more intense use of land than a single-family residential use, it meets the specific conditional use lot coverage<sup>3</sup> criterion. Including the proposed multi-purpose building and the existing building, the lot coverage is .309 acres, or 6.46 percent of the 4.781-acre site. Accordingly, the petition complies with Section 131.B.N.39.a.

Because the lot coverage of the proposed expansion of the religious facility is considerably less than 25 percent, the intensity of the religious facility use as proposed to be expanded is relatively low for this type of use. I conclude the size of the site in relation to the proposed expansion of the religious facility use is adequate to support the nature and intensity of the proposed uses.

The Petitioner is also proposing four multi-plex, age-restricted dwelling buildings on the 4.781-acre site. Age-restricted multi-plex uses are a relatively low intensity use, given the extent

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<sup>3</sup> Section 103.A.90 of the Zoning Regulations defines lot coverage as "[t]hat portion of a lot which, when viewed directly from above, would be covered by a structure or any part of a structure."



or degree of activities associated with the land use. Because the age-restricted adult multi-plex conditional use criteria permits one building per acre, the site is adequate to support the use, with the qualifications and conditions set forth in Part III below.

**c. The overall intensity and scale of the combined uses on the site**

To meet the third "intensity" test, the Petitioner must demonstrate that the intensification of uses and scale are appropriate, given the adequacy of the proposed buffers and setbacks. As a preliminary matter, the record in this case discloses that the landscaping and buffers for the existing uses are inadequate. Hillel Baron testified that many of the trees in the forest conservation and open space areas planted as a condition of approval in BA case NO. 95-36E were damaged and removed without replacement. Additionally Jane Schuchardt testified that the landscaping in around the stormwater management pond was inadequate.

To ensure adequate buffering, I am requiring as a condition of approval, that the Petitioner intensify the landscaping around the stormwater management pond between the pond and the cul-de-sac. Additionally, neither the multi-plex use nor the religious facility expansion use shall commence until the Petitioner demonstrates to the Department of Planning and Zoning that all landscaping required as a condition of approving the proposed uses in this case and as required by previously special exception approvals is planted and healthy. Prior to the commencement of the use, the Petitioner shall also provide the Department with a plan for maintaining the buffer for its approval. Additionally, all existing trees along the Rodona Drive lot line shall be maintained to the maximum extent possible. The site development plan shall include a note detailing the specific measures the Petitioner will take to ensure the maximum retention of these trees.

Subject to these conditions of approval, I conclude the conditional use plan, as amended January 12, 2009, comports with the third "intensity" test, whether the overall intensity and scale of the combined conditional uses on the site are appropriate, given the proposed buffers, setbacks, distance, and open space. The multi-purpose buildings and the multi-plex buildings are set back from all property lines at the required or greater distances. Although in my view the combined uses represents the limit of what can be considered an appropriate intensity, for the reasons discussed in Part III's evaluation of the multi-plex development's proposed site amenities, the TSR rightly concludes the uses are compatible with each other and with the surrounding neighborhood. To a large degree, this compatibility arises from the fact that the residential use will be combined with uses that are not continuous in operation.

B. Adverse Impacts. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed uses would have adverse effects in an R-20 district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the R-20 district. *Schultz v. Pritts*, 291 Md. 1,

432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with an expanded structure used primarily for religious activities and an age-restricted, multi-plex development in the R-20 district.

**a. Physical Conditions.** The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed uses, being primarily indoor uses, not generate inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood. Consequently, I conclude the Petitioner has adequately shown that noise, lighting, or other physical conditions generated by the proposed use will not be greater than that which is ordinarily associated with an expanded structure used primarily for religious purposes and an age-restricted multi-plex complex in the district.

**b. Structures and Landscaping.** The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Based on the evidence, and subject to the landscaping conditions of approval, I conclude the Petitioner has met its burden of demonstrating the proposed uses comply with Section 131.B.2.b. The record indicates the height of all structures will be less than the maximum

permitted. All landscaping buffers will meet county standards and there is no material evidence that the inherent operational characteristics of the proposed uses will inordinately discourage the use of adjacent land and structures.

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

The proposed parking spaces for the proposed uses meet or exceed minimum requirements. The Zoning Ordinance requires 35 spaces for the new religious assembly area and 35 are proposed, bringing the total spaces provided for the religious facility and school to 56. The multi-plex use requires 16 and 33 are proposed.

**d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.**

The existing access drive will continue to provide access for the uses on the Site and will likely provide access with adequate sight distance, based on actual conditions. Further evaluation for safe access and adequate sight distance will be conducted at the site development plan stage and may result in design refinements.

## **II. Specific Criteria for Structures Used Primarily for Religious Activities (Section 131.N.39)**

**a. Lot coverage shall not exceed 25 percent of lot area.**

Note 13 on the Conditional Use Plan dated January 12, 2009 states that the lot coverage for the religious use, including the proposed multi-purpose building and the existing building, is .309 acres, or 6.46 percent of the 4.781-acre site. Accordingly, the petition complies with Section 131.B.N.39.a.

b. Structures used primarily for religious activities may be erected to a greater height than permitted in the district in which it is located, provided that the front, side and rear setbacks shall be increased one foot for each foot by which such structure exceeds the height limitation.

According to the Conditional Use Plan dated January 12, 2009, the multi-purpose building will be 14 feet in height. Because the maximum height for a principal structure in an R-20 district is 34 feet, the petition complies with Section 131.B.N.39.b.

c. The Hearing Authority may approve parking facilities which are accessory to a religious facility, and are located on a separate lot, but do not meet the location requirements of subsection 133.B.4.D of the parking regulations by being separated from the religious facility by a public street, if the Hearing Authority finds that the accessory parking facility complies with the following criteria:

- (1) The accessory parking facility is not separated from the lot containing the principal use by an arterial highway of any category.
- (2) A pedestrian street crossing connecting the accessory parking facility lot to the principal use lot is provided and is made clearly noticeable to drivers by means of both pavement marking and signs
- (3) The pedestrian street crossing is safe, based upon such factors as, but not limited to: traffic volume at the times(s) of the use of the accessory parking facility; practical traffic speeds; sight distance; length of the crossing; and adequate markings and signage.
- (4) The entire pedestrian pathway from the accessory parking facility to the principal religious facility is a durable, paved, no-step path.

These criteria do not apply because the petition is not proposing accessory parking on a separate lot.

**III. Specific Criteria for Age-Restricted Adult Housing, Multi-Plex (Section 131.N.1.b)**

- (1) The landscape character of the site must blend with adjacent residential development. To achieve this:
  - (a) Grading and all landscaping shall retain and enhance elements that allow the site to blend and be compatible with adjacent residential development.

Although the site will be graded for the proposed uses, the change in grade will not be significant. According to the Conditional Use Plan dated January 12, 2009, only five pine trees along the Rodona Drive lot line will be removed during construction of the multi-plex buildings. Provided the remaining trees are retained, their retention will allow the site to blend with and be compatible with adjacent residential development. Additionally, as a condition of approval, the Petitioner will intensify the landscaping to the west of the stormwater management facility along the cul-de-sac and demonstrate to the Department of Planning and Zoning before the proposed uses commence that all required landscaping is planted.

**(b) The project shall be compatible with adjacent residential development by providing either:**

**(i) An architectural transition with buildings near the perimeter that are similar to neighboring dwellings in scale, materials and architectural detail as demonstrated by architectural elevations or renderings submitted with the petition; or**

**(ii) Additional buffering along the perimeter of the site, through retention of existing forest or landscaping, enhanced landscaping, berms or increased setbacks.**

The neighboring dwellings are single-family structures that are typically two stories in height. While several area dwellings are moderate in size (the older homes), many are significantly larger, with two car garages (Opponents' Exhibit 3).

Petitioner's Exhibit 6, which depicts the front and plan elevations of the standard multi-plex building, depict a building clad in brick and siding with a single, centered, covered entrance and symmetrical fenestration. The material and details of the buildings are compatible in character and style with adjacent residential development. Additionally, the standard buildings meet or exceed minimum setbacks. The petition accords with Section 131.N.1(b).

**(2) The following criteria shall be met:**

**(a) In the residential districts, one multi-plex dwelling unit building is permitted per acre. There shall be no more than five multi-plex dwelling unit buildings in a development. In the B-1 and B-2 Districts, the density shall be determined by available water and septic facilities.**

The petitioner is proposing to construct four multi-plex dwelling unit buildings on the 4.781-acre Property, in accordance with Section 131.N.2(a).

**(b) The net floor area of a multi-plex dwelling unit building is limited to 5,000 square feet.**

According to Petitioner's Exhibit 6 and the Conditional Use Plan dated January 12, 2009, the first floor gross and net square footage of the standard building is 2,937 and 2,522 respectively; and the second floor gross and net square footage is 2,825 and 2,477 respectively. The proposed net floor area is 4,999 square feet for each building, in accordance with Section 131.N.2(b).

However, the record is unclear whether the alternate building the net floor area will comply with this section. Although much of the second floor individual unit space is denoted as "storage space," the floor plan would clearly accommodate the use of this space as additional living areas, especially considering the inclusion of a bathroom on the second floor. Accordingly, I am unable to conclude the alternate building type complies with Section 131.N.2(b).

**(c) The multi-plex dwellings are limited to age-restricted adult housing. The petition must include copies of proposed deed restrictions or covenants that establish how the age restrictions required under the definition of age-restricted adult housing will be implemented and maintained.**

The petition includes a copy of the covenants establishing how the age restrictions required under the definition of age-restricted adult housing will be implemented and maintained, in accordance with Section 131.N.2(c).

**(d) The dwellings will incorporate universal design features from the Department of Planning and Zoning Guidelines that identify required, recommended, and optional features. The petition shall include descriptions of the design features of proposed dwellings to demonstrate their appropriateness for the age-restricted populations. The materials submitted shall indicate how universal design features will be used to make individual dwellings adaptable to persons with mobility or functional limitations and how the design will provide accessible routes between driveways, sidewalks, common areas and dwelling units.**

The petition includes a copy of the universal design features deemed appropriate by Howard County for age-restricted housing. However, the TSR observed the petition does not include descriptions of the specific interior design features that demonstrate their appropriateness for the age-restricted population as required by this section, including how universal design features will be used to make individual dwellings adaptable to persons with mobility or functional limitations, except for an elevator in each building. To accord with this section, the Petitioner shall provide specific information about the incorporation of all such universal design features at the site development plan stage.

**(e) Properties in the B-1 and B-2 Districts shall be outside of the Planned Service Area and adjoin, or be within 200 yards of a community shopping center development with a food store greater than 15,000 square feet.**

This criterion does not apply because the Property is located in an R-20 district with the Planner Service Area.

**(3) The development shall comply with the following bulk requirements:**

**(a) Maximum Height**

**(i) Principal Structures.....34 feet**



**(ii) Accessory Structures.....15 feet**

The proposed height of the standard multi-plex building, according to the Conditional Use Plan dated January 12, 2009 is 28 feet, in accordance with Section 131.N.3(a)(i). No accessory structures are proposed.

**(b) Minimum structure and use setback from perimeter of development:**

**(i) From public street right-of-way.....40 feet**

**(ii) From RC, RR, R-ED, R-20 or R-SC Districts, the setback applicable in the underlying zoning district.**

**(iii) From Zoning districts other than RC, RR, R-ED, R-20 or R-SC .....20 feet**

The multi-plex use and Buildings 2, 3, and 4 are set back 40 feet from the development's western perimeter and Building 4 is set back 72 feet from the north perimeter, in accordance with Section 131.N.3(b)(i).

**(c) Minimum structure setback from interior roadway or driveway for units with garages.....20 feet**

This section does not apply as no garages are proposed.

**(d) Minimum structure setback from lot lines:**

**(i) Side.....10 feet**

**Except zero lot line dwellings.....0 feet**

**A minimum of 10 feet must be provided between structures**

**(ii) Rear.....10 feet**

**(e) Minimum distance between principal structures.....10 feet**

All structures are set back more than 10 feet from lot lines and the distance between Buildings 2, 3, and 4 is 20 feet, in accordance with Sections 131.N.3(d) and (e).

**(4) At least 35 percent of the gross site area shall be open space or open area in accordance with the Subdivision and Land Development Regulations. The open space or open area shall provide amenities such as pathways, seating areas and outdoor recreation areas for the residents, and shall be protective of natural features.**

**Open Space.** Based on the 4.781-acre site area, the required open space is 1.67 acres. Should the site's actual acreage be 4.89 acres, the figure given in the MDAT records, the Petitioner shall increase the amount of open space to 1.71 acres.

**Amenities.** In its evaluation of the intensity of the combined uses, the TSR concludes as follows.

The site program meets the technical requirements for each section of the Zoning Regulations governing the respective Conditional Use, and the size of the site adequately supports the program. However, the Department of Planning and Zoning notes certain issues regarding the site design.

As evidenced by the requirement for site amenities, part of the appeal of living in an Age-restricted adult housing community is the opportunity for residents to enjoy an aesthetically pleasing environment. The placement of the Multi-Plex buildings on the Site results in views from the fronts of the buildings into the rear and side of the proposed multi purpose building/religious facility expansion. This orientation does not create a spatial relationship between buildings which would give the desired sense of place or community which would ideally be achieved in an Age-restricted Adult Housing community. The buildings appear to be intentionally oriented toward the religious facility expansion rather than toward an attractive living environment for residents.

Creating a courtyard, garden or outdoor amenity area could achieve an attractive, appealing social/gathering place. The site design meets the technical requirements for approval; however, the lack of enhanced site amenities and the lack of a cohesive spatial relationship between the residential buildings do little to enhance the desirability of the site as a livable community.

In response to these comments, the Petitioner amended the Conditional Use Plan (Petitioner's Exhibit 3) to include two additional amenity areas, a bocci court between Building 1 and the proposed multi-purpose building and another bench/gazebo area just south of the multi-purpose building, between the multi-plex use driveway in front of Buildings 3 and 4 and the parking spaces on the west edge of the circular driveway. The Amended Conditional Use Plan also depicts landscaping around the bench area in front of Building 3, around the amenity area

just south of the multi-purpose building, along the west and north sides of the multi-purpose building, and lastly, around the east, south, and west sides of the stormwater management facility.

The proposed amenity areas (public spaces) would be sited in close proximity to the multi-plex buildings and in particular to the first floor patios (public spaces) of the standard buildings, which inherently raises the very real potential of "social tension" or "use discord" between the residents relaxing in the amenity area public spaces and the residents enjoying their private outdoor spaces. This potential tension becomes more problematic with respect to the proffered alternate multi-plex building and the proposed amenity areas. As discussed above, the units in this building would have separate entrances, the front units would have large, open terraces, and the rear units, smaller open terraces, all of which would be in close proximity to two amenity areas. I am therefore denying the proffer of the alternate building for the reason that it has the very real potential to result in a diminution or loss of the required public amenity spaces. Lastly, to ensure that the required amenity spaces are retained, I am requiring as a condition of approval that there be no net loss of amenity space at the site development plan review phase.<sup>4</sup>

The TSR's observations and conclusions about the absence of a cohesive spatial relationship between the different uses on the site indirectly raise an additional concern about coexistence of the age-restricted multi-plex adult dwellings and the expanded religious facility use. Part 8.b of the conditional use petition directs the petitioner to provide details of the proposed use, including hours of operation, number of employees, and indoor and outdoor

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<sup>4</sup> This would permit the relocation of the amenity areas, but not their loss, to an alternative location at the site development plan phase.

activities. The details provided in the petition in this case address only the age-restricted multi-plex use. No pertinent information about the multi-purpose building is provided.

The evidence and testimony of record indicate, however, that the multi-purpose building will be used for post-religious ceremonies within the congregation, such as wedding celebrations. Additionally, the TSR notes that the Petitioner's response letter dated June 25, 2008 states that the residents of the multi-plex units may utilize the multi-purpose building. What specific use the residents would make of the multi-purpose building is unclear.

What is clear from the conditional use plan is that the multi-plex unit residents will be very close neighbors of the multi-purpose building. Some of these residents may be members of the congregation. Others may not. To ensure the compatibility of the two uses, I am requiring as a condition of approval that all non-religious assembly use of the multi-purpose building maintain the following hours of operation. From Sunday through Thursday, all non-religious assembly use of the multi-purpose building shall end by 9:30 p.m. On Friday, all non-religious assembly use of the multi-purpose building shall end by 10:30 p.m. On Saturday, all non-religious assembly use of the multi-purpose building shall end by 11:00 p.m. Additionally, all non-religious assembly use of the multi-purpose building shall be limited to the congregants, the on-site residents, and their guests.

**(5) Accessory uses may include social, recreational, educational, housekeeping, security, transportation or personal services, provided that the use of these services is limited to on-site residents and their guests.**

As discussed, the residents of the multi-plex development may use the multi-purpose building for non-religious assembly use. Subject to the conditions I am imposing on the approval of the proposed use, the petition accord with Sections 131.N(5).

**(6) For developments with more than five multi-plex dwelling unit buildings, at least one on-site community building or interior community space shall be provided that contains a minimum of 500 square feet.**

Because only four multi-plex dwelling unit buildings are proposed, this criterion does not apply.

**(7) The conditional use plan and the architectural design of the building(s) shall have been reviewed by the Design Advisory Pane, in accordance with Title 16, Subtitle 15 of the Howard County Code, prior to the submission of the conditional use petition to the Department of Planning and Zoning. The Petitioner shall provide documentation with the petition to show compliance with this criterion. [Council Bill 25-2008 (ZRA 91) Effective 8/6/08]**

Because the Petitioner submitted the petition prior to August 6, 2008, this section does not apply.

#### **IV. The Use of the Proposed Multi-Purpose Building by the Day-Care and Private Elementary School Facilities**

Hillel Baron testified that the day care center use would be moved to the multi-purpose building and that the children in day care and those in the private elementary school would use the proposed multi-purpose building for recreation during inclement weather. This proposed use of the multi-purpose building is not set forth in the petition. Additionally, as Condition 7 in Board of Appeals Case No. BA 88-37E provides, "[n]o expansion of the [day care] facilities shall be permitted without an amendment to this special exception."<sup>5</sup>

The Petitioner has not applied for an expansion of the day care facility, nor, in my view, presented sufficient information about the elementary school or day care facilities' use of the

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<sup>5</sup> As noted above in the Zoning History section, the Board amended its Decision and Order in BA Case No 95-36E to permit children attending the elementary school to use the outdoor recreations areas currently used by the children of the day care program and to permit children in the elementary school to use portions of the addition, provided that the number of children in each program complies with the requirements of the respective special exception.

multi-purpose building to permit me to approve such use. In addition, the petition states the request for the expansion of structures used primarily for religious activities includes "renovation" of the main building, but the Petitioner adduced no evidence as to what "renovation" substantively entails.

For these reasons, my decision to approve the proposed uses is subject in part to the conditions that the day care and private elementary school facilities not share use of the multi-purpose building, including any indoor recreational use, and that any renovation of the main building not result in an expansion of either the day care or private school facility. The Petitioner shall note the renovations to be undertaken on the site development plan. No expansion of the uses into the multi-purpose building or the expansion of the day care or private school facility use within the main building shall be permitted without an amendment to the religious facility, the day care facility, and the private school facility conditional uses.

**ORDER**

Based upon the foregoing, it is this 11<sup>th</sup> day of February 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the proffer of an alternate multi-plex dwelling type as a substitute for Building One is **DENIED**;

That the petition of Lubavitch of Howard County, Inc. for a conditional use to (1) expand and renovate a previously approved conditional use for a structure used primarily for religious activities and expand the building's parking area, pursuant to Section 131.N.39 of the Howard County Zoning Regulations, and (2) construct four age-restricted, adult multi-plex dwellings, pursuant to Section 131.N.1.b. of the Howard County Zoning Regulations, in an R-20 (Residential: Single) Zoning District, is hereby **GRANTED**;

**Provided, however, that:**

- (1). The conditional uses shall be conducted in conformance with and shall apply only to the uses described in the petition and depicted on the conditional use plan submitted on November 11, 2008, as amended January 12, 2009, and not to any other activities, uses, or structures on the Site.
- (2). From Sunday through Thursday, all non-religious assembly use of the multi-purpose building shall end by 9:30 p.m. On Friday, all non-religious assembly use of the multi-purpose building shall end by 10:30 p.m. On Saturday, all non-religious assembly use of the multi-purpose building shall end by 11:00 p.m.
- (3). There shall be no outdoor use of any non-religious assembly use of the multi-purpose building.

- (4). All non-religious assembly use of the multi-purpose building shall be limited to the congregants, the on-site residents, and their guests.
- (5). The day care and private elementary school facilities not share use of the multi-purpose building, including any indoor recreational use.
- (6). The renovation of the existing structure to remain shall not result in an expansion of either the day care or private school facility. The Petitioner shall note the renovations to be undertaken on the site development plan.
- (7). No expansion of the day care or private elementary school facility uses into the multi-purpose building or the expansion of the day care or private school facility use within the main building is permitted without an amendment to the religious facility, the day care facility, and the private school facility conditional uses.
- (8). The Petitioner shall intensify the landscaping around the stormwater management pond between the pond and the cul-de-sac.
- (9). The Petitioner shall provide information about all universal design features related to the multi-plex dwelling use at the site development plan stage.
- (10). Neither the multi-plex dwelling use nor the religious facility expansion use shall commence until the Petitioner demonstrates to the Department of Planning and Zoning that all landscaping required as condition of approving the proposed uses in this case and by previously required special exceptions is provided. Any trees previously required but not in place shall be replaced with trees of a minimum of six feet in height.



(11). Prior to the commencement of the uses, the Petitioner shall provide the Department with a maintenance plan for the buffer for the Department's approval. A copy of the plan shall be filed with the Board of Appeals Hearing Examiner.

(12). All existing trees along the Rodona Drive lot line shall be maintained to the maximum extent possible. The site development plan shall include a note detailing the specific measures the Petitioner will take to ensure the maximum retention of these trees.

(13). There shall be no net loss of the multi-plex use amenity space during the site development plan phase.

(14). The Petitioner shall install a stop sign where the driveway meets Howes Lane.

(15). The Petitioner shall comply with all applicable federal, state, and county laws and regulations.

(16). The two conditional uses shall not commence until the foregoing conditions have been met and the Department of Planning and Zoning has inspected the Property to verify compliance. A copy of the inspection shall be filed with the Board of Appeals.

(17). The Petitioner must obtain a building permit for the first age-restricted, adult multi-plex dwelling, the multi-purpose building, and any building permit necessitated by the renovation of the existing structure adjacent to the multi-purpose building within five (5) years of the date of this Decision and Order.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: 2/13/09

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.